
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Kobayashi

Attorney Docket No.: GENSP105

Application No.: 7,620,062

Issued: November 17, 2009

Title: METHOD OF REAL TIME OPTIMIZING
MULTIMEDIA PACKET TRANSMISSION RATE

Confirmation No.: 6764

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I hereby certify that this correspondence is being transmitted electronically through EFS-WEB to the Commissioner for Patents, P.O. Box 1450 Alexandria, VA 22313-1450 on January 14, 2010.

Signed: /Kristina Gomez/
Kristina Gomez

**STATEMENT OF THE CORRECT PATENT TERM ADJUSTMENT:
BASIS(ES) UNDER § 1.702 FOR THE ADJUSTMENT
(37 C.F.R. § 1.705)**

Mail Stop **Petitions**
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This statement is being submitted in support of the “REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT INDICATED IN THE ISSUE NOTIFICATION” to which this statement is attached.

Applicant hereby requests reconsideration of the patent term adjustment indicated in the Issue Notification under 37 CFR 1.705. Specifically, Applicant respectfully maintains that in light of the recent binding Court of Appeals for the Federal Circuit decision in *Wyeth v. Kappos*, No. 2009-1120 (Fed. Cir., January 7, 2010), Applicant is entitled to a total of 1702 days, or an increase of 455 days over the 1247 days granted in the Issue Notification.

Statement of Facts

It is understood that the USPTO is in the process of changing the manner it calculates patent term adjustment (PTA) under 35 U.S.C. 154(b) to conform with the decision in *Wyeth*, which affirmed the judgment of the District Court for the District of Columbia granting summary

judgment in favor of Wyeth. The Court determined that the USPTO had misconstrued 35 U.S.C. § 154(b)(2)(A), and as a result, had denied Wyeth a portion of patent term to which it was entitled under U.S. Patent Law. Summarizing the USPTO's position, the Court stated that "the PTO uses either the greater of the A delay or the B delay to determine the appropriate adjustment but never combines the two." Wyeth, however, argued that the "A period" and "B period" overlap only if they occur on the same calendar day or days. The Court determined that Wyeth's construction of § 154(b)(2)(B) was correct, stating that "[t]he only way that [A and B] periods of time can 'overlap' is if they occur on the same day."

In the present case, Applicant asserts that the PTO accurately calculated the "A" period of 1294 days from the date of the 14 month anniversary (2/2/06) of the filing date of the application (12/2/03) to the mailing date of the first non-final rejection (8/19/08).

There was 47 days of Applicant delay from 9/12/08 to 10/29/08 for filing of Information Disclosure Statements after a Response to an Office Action was filed, adjusting the "A" time to 1247 days.

Despite the accuracy described in the previous paragraph, the PTO failed to provide any determination of patent term adjustment based on the "B" period. This was of course standard practice in such circumstances prior to the *Wyeth* decision, but is incorrect now. Specifically, Applicant has identified a "B" period of 455 days from the 3rd anniversary (12/2/06) of the filing date to the Patent Issue Date (11/17/09).

Additionally, the "A" period and the "B" period overlap for 626 days (12/2/06 – 08/19/08). Accordingly, the correct calculation of PTA in this case is "A" time (1247 days) + "B" time (1081 days) – Overlapping time (626 days), for a total of 1702 days.

However, the PTO calculated PTA (1247 days) did not take into account the non-overlapping "B" time. This results in an additional "B" period of 455 days that the Applicant is entitled to under *Wyeth* as uncredited "B" period. Therefore, the Applicants request 455 additional days of PTA for a total of 1702 days.

Respectfully submitted,
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